

8

No. 91-781

Supreme Court, U.S.

FILED

JUN 26 1992

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
Petition Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

vs.
LARRY BILDERER, APPURTENANCES AND
FURNITURE STORE, 4001 BUENA VISTA AVENUE,
LOS ANGELES, CALIFORNIA, AND RUTH ANN GOODWIN,

Respondents.

Appeals from the United States Court of
Appeals for the Ninth Circuit

JOHN J. GIBBY, JR.
General Counsel
COUNCIL OF BANKERS

JOHN J. GIBBY, JR.
General Counsel
Council of Bankers

MICHAEL F. CROTTY
Deputy General Counsel for
Litigation

JOHN J. GIBBY, JR.
Senior Federal Legislator
Council

AMERICAN BANKERS ASSOCIATION

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 643-5026

JUNE 26, 1992

PRINTED BY SYDNEY S. ADAMS, WASHINGTON, D.C. (202) 347-2563

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the relation-back doctrine applies to property otherwise excepted from forfeiture pursuant to the innocent owner defense.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
I. The Holding Of The Court Below Should Be Affirmed	6
II. The Government's Claim That There Are Other Similar Avenues For Innocent Third Parties To Protect Their Interest In Property Is Erroneous	10
III. The Government's Analysis Of Both Case Law And Congressional Intent Are Erroneous	12
CONCLUSION	15

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Calero-Toledo v. Pearson Yacht Leasing Co.</i> , 416 U.S. 663 (1974)	11,13
<i>In re Metmor Financial, Inc.</i> , 819 F.2d 446 (4th Cir. 1987)	11
<i>In re Real Property Titled in the Name of Shashin, Ltd.</i> , 680 F. Supp. 332 (D. Hawaii 1987)	11
<i>Ricci v. Key Bancshares of Maine, Inc.</i> , 662 F. Supp. 1132 (D. Me. 1987)	6
<i>The Palmyra</i> , 25 U.S. (12 Wheat) 1 (1827)	12
<i>United States v. Stowell</i> , 133 U.S. 1 (1890)	3,12
STATUTES:	
21 U.S.C. § 853	13
21 U.S.C. § 881(a)(6)	2,3
21 U.S.C. § 881(a)(7)	3
21 U.S.C. § 881(h)	3
MISCELLANEOUS:	
Adams, <i>The Government's Forfeiture Power: An Unreasonable Threat to Bona Fide Lenders</i> , 4 LENDER LIABILITY NEWS 1 (June 12, 1991)	9
Clark and Pomares, <i>Responding to Claims by Innocent Third Parties</i> , CIVIL REMEDIES IN DRUG ENFORCEMENT REPORT (October/November 1991)	10
Cook, <i>Complying with the Spirit of BSA: "Know Your Customer" Policies and Suspicious Transactions Reporting</i> , ABA BANK COMPLIANCE, Summer 1991	4
Note, <i>Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment</i> , 89 Mich. L. Rev. 165 (1990)	7-9

Table of Authorities Continued

	Page
Remarks of Senator Culver, 124 Cong. Rec. S23056 (daily ed. July 27, 1978)	15
Remarks of Senator Nunn, 124 Cong. Rec. S23057 (daily ed. July 27, 1978)	15
<i>The White House Conference for a Drug-Free Amer- ica</i> Final Report (June 1988)	7

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-781

UNITED STATES OF AMERICA,

Petitioner,

v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND
IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE,
RUMSON, NEW JERSEY, AND BETH ANN GOODWIN,

Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Third Circuit

BRIEF OF THE AMICUS CURIAE
AMERICAN BANKERS ASSOCIATION
IN SUPPORT OF RESPONDENTS

The American Bankers Association hereby respectfully submits this brief as amicus curiae in support of the Respondents, with the consent of both the parties. The signed consents of each are filed together with this brief.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association ("ABA") is the principal trade association of the commercial banking

industry in the United States, having as members both national and state-chartered banks, located in each of the fifty states and the District of Columbia. Member banks of the Association range from the smallest of community banks through regional, super-regional and money center banks. Collectively, our membership holds over ninety percent of the assets of all domestic commercial banks.

In the ordinary course of performing one of the core functions of the banking industry, lending money, commercial banks regularly acquire "interests" in property—mortgages on real property, liens on such things as automobiles and boats, and so forth—as collateral for loans made. In the event that such property ends up as the subject of a civil forfeiture, banks stand to lose their security interest in their collateral. Under the government's theory in this case, carried to its logical and inevitable conclusion, our member banks would have no opportunity to oppose such a forfeiture or otherwise protect their interests as a matter of right, but would be left instead to the mercy and discretion of the very same Executive Department that has vigorously pursued the civil forfeiture in the first place, operating under rules promulgated by that Executive Department (subject to change by that Executive Department), and applying whatever burden of proof standards seem suitable to that Executive Department.

The ABA respectfully submits this brief to urge the Court to uphold the decision of the United States Court of Appeals for the Third Circuit which rejected the government's theory. That decision concluded that there is an "innocent owner" defense (21 U.S.C. § 881(a)(6)) under the civil forfeiture laws, and that

the government must overcome it before the "relation-back" doctrine (21 U.S.C. § 881(h)) can be utilized.

This case deals with the government's attempt to enforce a civil forfeiture under 21 U.S.C. section 881(a)(6) of a house that was believed to have been purchased with money obtained from illegal drug transactions. The respondent asserts that she was ignorant of the source of funds used to purchase the house. The government claims that it is irrelevant whether that is so or not because there is no "innocent owner" defense¹ where the respondent obtained her interest in the property after the events occurred giving rise to the forfeiture of the purchase money. The government takes the position that the relation-back doctrine gives it entitlement to the property as of the date of the offense. This theory states that once property is tainted by an illegal act, all rights to the property vest in the government and any subsequent owners have claim to the title inferior to that of the government.²

Banks and other financial institutions have long supported the government's efforts to stem the flow of monies derived from illegal drug transactions. The criminal and civil forfeiture laws do serve a useful purpose in taking the profit out of drug dealing. How-

¹ The innocent owner defense that is contained in 21 U.S.C. 881 (a)(6) and (a)(7) provides that property is exempt from forfeiture "to the extent of the interest of an owner by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

² The first use of the doctrine was in *United States v. Stowell* 133 U.S. 1 (1890).

ever, the government's assertion of sweeping authority to seize property is unparalleled and places legitimate businesses such as financial institutions in a position of having to prove their lack of knowledge or awareness concerning the underlying transactions. This shift of the burden of proof is extremely difficult but the government's position in this case goes far beyond making an innocent party prove its case. The government here is advocating the elimination of the innocent owner defense in certain circumstances. Financial institutions will be prevented from having their day in court to protect their property if the government succeeds.

If this decision is reversed, financial institutions will restrict the flow of credit or other banking transactions to individuals when there is even the slightest suspicion of illegal activity. Our nation's banks, who are in the front-line of establishing programs to "know your customer,"³ will never be able to rely on their deterrence efforts again. As long as there exists even the remote possibility that an institution may lose the value of its loan or collateral on a piece of property because the government has traced the proceeds of a crime to another entity, the financial institution will have to substantially limit its business activities. This result will hamper both domestic and international commerce and is simply not justified.

The Association believes that the decision of the Third Circuit must be upheld and that the innocent owner defense must be made available even after the

³ See, Cliff E. Cook, *Complying with the Spirit of BSA: "Know Your Customer" Policies and Suspicious Transactions Reporting*, ABA BANK COMPLIANCE, Summer 1991, p. 7.

commission of the act leading to the forfeiture. We vehemently disagree with the government's assertion that retaining the innocent owner defense for recipients of "tainted property even if ignorant of the source [of the funds] would undercut the effectiveness of forfeitures."⁴

SUMMARY OF THE ARGUMENT

Commercial transactions in the United States depend on the informed belief of all parties to a transaction that individuals have the ability and right freely to transfer monies, property or goods. The banking industry has been particularly hard hit during the past few years from failures and losses due in part to loans secured by real estate that have fluctuated in value. In addition, the lack of certainty on the scope of liability under various laws (such as the environmental liability statutes)⁵ has forced banks to withhold credit or somehow restrict the flow of funds to otherwise worthy customers. This obviously has had a negative effect on the economy.

If this decision is reversed, similar credit tightening will begin anew. No prudent lender can rest knowing that the potential exists that the property in a transaction may be seized and its value lost. America's banks are implementing strong procedures to identify

⁴ Petitioner's Brief at p. 13.

⁵ For example, S. 543 passed the Senate in October, 1991 because of the need to clarify lender liability under the Superfund laws. (P.L. 96-510). The hearing record established that financial institutions face considerable liability for cleaning up environmental damage that was not caused by those entities and this was "exacerbating the credit crunch, particularly for small businesses." S. Report 102-167 at 190.

their customers to determine whether illegal activity has occurred. If any bank makes a good-faith determination that a customer is honest and a good credit risk, the government should not be able to come in and seize the collateral for a loan without allowing the use of the innocent owner defense. Fairness requires no less.

Another problem will continue to exist for lenders if the government prevails. Lenders who refuse to make loans collateralized by property for fear of a forfeiture run a risk of violating their duty to the customer. A lender's effort to investigate prospective borrowers could conflict with its efforts to comply with the anti-discrimination laws or could subject it to defamation claims.⁶

The Third Circuit was correct in its concern that if the relation-back theory preempts the innocent owner defense, innocent third parties would receive the brunt of the government's wrath and lose their means of staying in business. Our brief argues that by denying the use of the innocent owner defense in situations where illegally derived monies have been used to purchase real property, the effect on the economy will be enormous and contrary to the goals of the statute and of the government.

ARGUMENT

I. The Holding Of The Court Below Should Be Affirmed.

Elimination of the innocent owner defense is contrary to the stated goals of Congress and the gov-

⁶ See, *Ricci v. Key Bancshares of Maine, Inc.*, 662 F. Supp. 1132 (D. Me. 1987) (Upholding of \$15,000,000 punitive damage award against a bank for terminating a customer's line of credit based on an incorrect tip from the FBI.)

ernment under the forfeiture laws. The United States' war on drugs and their profits demand drastic measures. The response to the ever changing face of drug trafficking has been to attack the monies and properties that are purchased and received from this heinous activity. The weapons of choice have been the seizure and forfeiture activity advanced in the 1980's through a series of legislative enactments by the U.S. Congress.⁷

The position taken by the government here runs counter to its stated goals of using forfeiture to take the profit out of drug trafficking. If the Third Circuit's decision is reversed, as advocated by the government, innocent third parties will be punished by eliminating the right to due process under 21 U.S.C. section 881. This was clearly not intended by Congress nor the government. In fact, the addition of the real property forfeiture provisions to section 881 was done to further deterrence.⁸

⁷ According to a 1988 Administrative Report on drug abuse:

The seizure and forfeiture of the assets of drug offenders and drug money launderers constitutes one of the finest tools U.S. law enforcement authorities have to combat the drug trade. Drug trafficking is a crime driven by the potential for illicit profit, and the forfeiture of assets sends a powerful message to drug criminals that crime does not pay. However, the use of seizure and forfeiture as a weapon in the war against drugs must be expanded.

The White House Conference for a Drug-Free America Final Report (June 1988), p. 56.

⁸ See, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 Mich. L. Rev. 165, 189 (1990). The article goes on to cite the 1988 Department of Justice Manual which states that "[t]herefore,

Deterrence is not furthered by a governmental policy that places all property transfers in jeopardy. Deterrence is not even furthered in this case where the property that is being claimed by the government is not in the hands of the individual who allegedly violated the law. In fact, the respondent has already forced Mr. Brenna to leave her house; he is a fugitive from justice who, if he were ever to return to take advantage of the particular "tainted" property here in issue, would risk arrest. How is the individual who violated the law deterred from further criminal activity by having the government take property in which he has no legal or real interest?⁹

The expansion of the relation-back doctrine will turn common commercial activity on its head. Even with

even if the property is worth a little, its forfeiture may nonetheless serve legitimate and overriding law enforcement objectives by depriving the wrongdoer of its use and availability." (at 189). In the 1990 Annual Report of the Department of Justice Asset Forfeiture Program, the Department does not mention relation-back, but states only that, "Federal forfeiture law expressly provides protection to the 'innocent owner', a party with an interest in the property subject to forfeiture who can demonstrate that, as the law requires, he had no knowledge of the illegal activity giving rise to the forfeiture, did not consent to the activity, and/or took all reasonable steps to prevent the activity."

⁹ To take the government's position to its logical extreme, there is nothing to prevent seizure of the funds paid by Ms. Goodwin to the previous owner of the property or commission on the sale received by the real estate agent. Or to "trace" the disposition of those funds even further, perhaps to a new residence purchased by the prior owners of 92 Buena Vista Avenue, to the prior owners of *that* residence, and so on ad infinitum. The "relation-back" doctrine necessarily clouds title in all those transactions without an "innocent owner" defense.

the most advanced and aggressive monitoring system by financial institutions, all loans made with property as collateral may be forfeited due to an action that took place months or even years before the forfeiture. The advances made by the government in detecting and sorting out complex economic crimes are no match for the test of time.

As has been pointed out before, the public policy goals advanced by the government in the civil forfeiture area (i.e. deterrence) are not at issue here. Instead, the government has made it clear what it is trying to achieve in asking for a reversal in the Third Circuit. The government unabashedly states that "[p]ermitting the 'innocent owner' exception to be invoked by recipients of tainted property, *even if ignorant of the source of their gifts*, would undercut the effectiveness of forfeitures."¹⁰

The government is calling for an end to a third party's ability to attempt to prove its innocence no matter what the cost. Under the forfeiture laws, the "potential for prosecutorial abuse is obvious."¹¹ The government contends for a construction of the law whereby third parties may be punished based not on the issue of guilt or innocence, but on "such fortuitous factors as when the criminal act occurred or what type of forfeiture action the government chose to pursue."¹² The government's brief is a thinly-veiled at-

¹⁰ Petitioner's Brief at 13 (emphasis added).

¹¹ Mich. L. Rev. at 190, *supra* n. 8.

¹² See Adams, *The Government's Forfeiture Power: An Unreasonable Threat to Bona Fide Lenders*, 4 LENDER LIABILITY NEWS 1 (June 12, 1991) p. 12. The author points out an example

tempt to eliminate the innocent owner defense completely. However, even members of government's army against drug trafficking recognize Congressional intent. Members of the Drug Enforcement Administration recently admitted that the results of asset forfeitures "have sometimes proven draconian, especially in cases where owners have no knowledge of the illegal use of their property [and] [a]s a result, Congress has enacted 'innocent owner' provisions to help counteract some of the inequities of the forfeiture process."¹³

II. The Government's Claim That There Are Other Similar Avenues For Innocent Third Parties To Protect Their Interest In Property Is Erroneous.

The government, anticipating the argument from the lending community on unfairness, states that "[t]he harshness of statutory forfeiture has traditionally been tempered through administrative procedures for remission and mitigation."¹⁴ The government goes on to argue that these procedures will not deprive persons who wish to regain forfeited property the opportunity to prove their innocence but rather "would simply require those persons to avail themselves of procedures that are authorized under a dif-

of abuse toward lenders:

Thus in the case where an innocent bank holds a mortgage on property that turns out to be forfeitable, because it once housed a securities boiler room and was used to facilitate wire fraud, the bank may protect its lien under the criminal money laundering forfeiture law but not under the civil law.

¹³ Clark and Pomares, *Responding to Claims by Innocent Third Parties*, CIVIL REMEDIES IN DRUG ENFORCEMENT REPORT (October/November 1991) p. 6.

¹⁴ Petitioner's Brief at 37.

ferent statutory section."¹⁵ Experience with petitions for remission and mitigation shows it to be a poor substitute for persons wishing to have their day in court.

First, the petition and remission procedures are a "false remedy" for the unfairness of certain civil forfeiture actions because decisions are generally not subject to judicial review. In addition, the extraordinary delay under the petition and remission procedures in the disposition of cases substantially reduces the value of property that has been seized. Many bankers have had bad experiences with this remedy and some have concluded that when a bank is a third-party lienholder, it would be better served by incurring the extra costs and expense involved by contesting the forfeiture of the seized party in the courts in lieu of filing petitions for remissions or mitigation.

Most importantly, the standards of proof are higher under these procedures than under the innocent owner defense.¹⁶ A remission petition will also not allow a lender to recover his costs and attorney's fees whereas several courts have allowed the recovery of attorney's fees for the innocent owner defense.¹⁷

¹⁵ Petitioner's Brief at 41.

¹⁶ The standards are those enunciated under *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) that in addition to showing lack of knowledge or uninvolved with the illegal activity, that the lender took all reasonable steps to prevent the illegal use of the property.

¹⁷ *In re Metmor Financial, Inc.*, 819 F.2d 446 (4th Cir. 1987); *In re Real Property Titled in the Name of Shashin, Ltd.*, 680 F. Supp. 332 (D. Hawaii 1987).

The government also points to its recent policy for Expedited Forfeiture Settlement Policy for mortgage holders as another alternative for innocent third parties to get a return of property. While our association applauds and was involved in the negotiations surrounding the creation of this new policy, the fact is that the policy is not mandatory and is only used in situations where the government does *not* contest a lender's claim to the property. Therefore, the procedure is not a substitute for litigating one's innocence in court on a government forfeiture.

The government also argues that "Federal law enforcement authorities do not, as a matter of practice, pursue forfeiture of property in the hands of bona fide purchasers for value who would ordinarily be expected to lack notice of the government's prior claim."¹⁸ What protection will be afforded an innocent lienholder if the government does pursue these properties and the innocent owner defense is eliminated?

III. The Government's Analysis Of Both Case Law And Congressional Intent Are Erroneous.

The government states that in construing early forfeiture statutes, this court has uniformly rejected the innocent owner argument.¹⁹ In point of fact, Congress has long provided statutory protection for innocent owners and the courts have honored that protection. In *United States v. Stowell*, 133 U.S. 1, 15-16 (1890), the Supreme Court, in discussing section 3262 of the Revised Statutes, stated: "That section clearly indicates that the interest of an innocent mortgagee or

¹⁸ Petitioner's brief at 39.

¹⁹ Petitioner's Brief at 15 citing *Calero-Toledo*, 416 U.S. at 683-684 (citing *The Palmyra*, 25 U.S. (12 Wheat) 1, 14-15 (1827)).

other person having a lien on the lot or tract of land on which the distillery was situated would not otherwise be included in a forfeiture for acts of the owner only." Also, even the seminal case on forfeiture that favored the government was not ready to eliminate an innocent owner defense:

[i]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. . . Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.²⁰

In other words, if an innocent owner defense did not exist by reason of a statute, one would have to be created. The Constitution demands it.

The government draws the analogy between the civil forfeiture provisions of 21 U.S.C. section 881 and the criminal forfeiture provisions of 21 U.S.C. section 853. Section 853 provides a defense for innocent "transferees." In this case, Ms. Goodwin is clearly a "transferee," and would, in a criminal forfeiture case, be entitled to assert that defense. By contrast, Section 881 does not mention transferees; it mentions "owners" instead. The government construes this to

²⁰ See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. at 689-90.

mean persons who already owned property alleged to be subject to forfeiture prior to the time that property became involved in the transaction or events giving rise to forfeiture.²¹ In this case, the government argues, Ms. Goodwin is not and never has been the "owner" of 92 Buena Vista Avenue because she did not acquire an ownership interest prior to the time of the the unlawful transactions charged against Mr. Brenna.

We point out that that construction is not necessarily dictated by the language of the statute itself, and, indeed, is contradicted by the language. Section 881(a)(6) makes subject to forfeiture "all moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter,[and] *all proceeds traceable to such an exchange.*" The statute goes on to provide that *none* of such property is subject to forfeiture in the case of an owner without knowledge or consent. Obviously, someone can "own" money or securities or other things of value prior to the use of such property by another in the commission of a crime. But equally obvious is the fact that one cannot "own" the *proceeds* of an illegal act prior to the commission of the illegal act. Prior to the commission of the act, the property would not constitute "proceeds". And yet, the statutory innocent owner defense in section 881 extends to "proceeds" as well as to property that might be owned beforehand.

The broader construction of the term "owner," for which we contend, is amply supported by the legis-

²¹Petitioner's Brief at 12.

lative history as well. It is clear that Congress intended the protections of the innocent owner defense to extend to "transferees" in section 881 as well as to other kinds of "owners."

The legislative history of this defense, first outlined in the Psychotropic Substances Act of 1978, makes clear that the innocent owner defense was created "in order to protect the individual who *obtains* ownership of proceeds [of criminal activity] with no knowledge of the illegal transaction."²²

More importantly, Congress intended "to make it clear that a bona fide party who has no knowledge or consent to the property he owns having been derived from an illegal transaction, that party would be able to establish that fact under this amendment and forfeiture would not occur."²³

CONCLUSION

The government's efforts in the war on drugs are to be commended. The use of federal and state forfeiture laws, when used to punish wrongdoers is a valuable tool of deterrence. However, the government's position in this case goes well beyond the stated goals of the forfeiture laws and will have a ripple effect on all commercial transactions in the United States for years to come. By cutting off the ability to prove one's innocence, no amount of due diligence or aggressive reporting of suspicious transactions will help our nation's institutions avoid the clearly unintended results of the civil forfeiture law

²² 124 Cong. Rec. S23056 (daily ed. July 27, 1978) Remarks by Senator Culver (emphasis added).

²³ *Id.* at S23057 (remarks by Sen. Nunn).

as applied by the government; namely that all transactions are suspect and all may be lost to the government.

The analysis of section 881 by the Third Circuit is a careful, common-sense response to a complex statutory scheme. Fairness demands due process to protect one's interest in property and for these reasons, the American Bankers Association as *amicus curiae* urges this court to affirm the decision of the Third Circuit.

Respectfully submitted,

JOHN J. GILL III
General Counsel

MICHAEL F. CROTTY
*Deputy General Counsel for
Litigation*

Of Counsel:
JOHN J. BYRNE
*Senior Federal Legislative
Counsel*

AMERICAN BANKERS ASSOCIATION

AMERICAN BANKERS ASSOCIATION
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 663-5026

June 26, 1992